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Larceny of Referendum Petitions

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Larceny of Referendum Petitions

In the Green County Criminal Court was heard and determined *State of Missouri v. Richard McCulloch.*[1] The indictment was in three counts and omitting formal phraseology was in the following language:[2]

"Richard McCulloch and Bruce Cameron,[3] on the fifteenth day of June, one thousand nine hundred and eighteen, at the city of St. Louis, aforesaid, into a certain building of Daniel K. Catlin, Theron E. Catlin, Irene C. Allen and Julius Pitzman, there situate and being, which said building was then and there occupied and used for offices, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares, merchandise, other valuable things and personal property in the aforesaid building then and there kept and deposited; and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight (8) leaves, and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words, to wit:

" 'Petition for Referendum on United Railways Compromise Bill,' of the goods, wares, merchandise, other valuable things and personal property of one Edward H. Heilman, of the value of twenty-two dollars and eighty-seven ($22.87) cents, in the aforesaid building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use thereof, and to convert the same to their own use, against the peace and dignity of the State.

1. The author has been furnished the briefs prepared in the cause by both plaintiff and defendant. Acknowledgment is here made to Honorable Lawrence McDaniel and Honorable Elliott W. Major for their kindness.
2. Brief for plaintiff, pp. 2-5.
3. Bruce Cameron was apparently granted a severance.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that Richard McCulloch and Bruce Cameron, on the fifteenth day of June, one thousand nine hundred and eighteen, at the City of St. Louis, aforesaid, into a certain building of Daniel K. Catlin, Theron E. Catlin, Irene C. Allen and Julius Pitzman, there situate and being, which said building was then and there occupied and used for offices, and which said building was then and there tenanted by and in the possession of one Edward H. Heilman, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares, merchandise, other valuable things and personal property in the aforesaid building then and there kept and deposited; and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight (8) leaves, and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words to wit:

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"And the grand jurors aforesaid, upon their oath aforesaid, do further present that Richard McCulloch and Bruce Cameron, on the fifteenth day of June, one thousand nine hundred and eighteen, at the City of St. Louis, aforesaid, into a certain building of Edward H. Heilman, there situate and being, which said building was then and there occupied and used for offices, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares,

merchandise, and other valuable things and personal property in the aforesaid building, then and there kept and deposited, and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight leaves (8), and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words, to wit:

" 'Petition for Referendum on United Railways Compromise Bill,' of the goods, wares, merchandise, other valuable things and personal property of the said Edward H. Heilman, of the value of twenty-two dollars and eighty-seven ($22.87) cents, in the aforesaid building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use thereof, and to convert the same to their own use, against the peace and dignity of the State.

"Lawrence McDaniel,
"Circuit Attorney."

It will be observed that the indictment charged both burglary in the second degree and larceny.[4] A demurrer to the indictment was overruled but after the plaintiff had presented its testimony a so-called demurrer to the evidence was sustained. Presumably a verdict of acquittal was directed for defendant.[5] It will be assumed that the testimony established (for the purpose of a directed verdict) the fact that referendum petitions as specified in the indictment were stolen and that there was also written on the petitions the ward, precinct, name and residence of each signer and that an affidavit and acknowledgment was attached to each petition.[6] It followed, therefore, that the basic

4. R. S. Mo., 1909, Sec. 4520, 4528.
5. See note by R. E. Murray, p. 25.
6. Hon. Elliott W. Major, counsel for defendant, wrote the author as follows: "On the trial the evidence upon the part of the state was that nothing was taken except duly signed and acknowledged referendum petitions. These referendum petitions had printed thereon the ordinance being referred, the ward, precinct, name and residence of each signer and an acknowledgment and affidavit attached to each petition making same complete in every respect."

question involved was whether the referendum petitions under the evidence were subject matter of larceny. Judge Orin Patterson decided the question in the negative and gave the following opinion.[7]

"JUDGE PATTERSON: Well, gentlemen, the Court has decided to put its conclusions about this demurrer in writing.

"It would take a rather extended opinion to adequately discuss the decisions at law that are involved in the demurrer to the evidence. In this written statement that the court has prepared of its conclusions there is no attempt to adequately discuss the law applicable to the case. It, as you will find when I read it to you, represents merely the conclusions of the court about the law that is applicable to this case. It is as follows:

"One of the essential elements of the charge of burglary in this case is an intent to steal. The things that were taken were referendum petitions. There is a statute that makes a bill introduced in either branch of the Legislature the subject of larceny. There is no statute that makes a referendum petition the subject of larceny.

"Whether the wrongful taking of referendum petitions is evidence of an intent to steal or constitutes larceny depends on whether or not referendum petitions are personal property. The referendum petitions, when taken, were in the custody of Mr. Proske, one of the five committeemen. They were to be filed with the Election Commissioners of St. Louis the following day. They were signed by more than 10,000 voters of St. Louis. They contained an application to the Board of Aldermen of the city of St. Louis to repeal an ordinance known as the United Railways Compromise bill, or to refer that ordinance to the voters of St. Louis for their rejection or approval.

"The purpose of the referendum petitions was a purely public purpose of a legislative nature.

7. The copy of the opinion was furnished by Circuit Attorney McDaniel, counsel for plaintiff. It agrees with the report of the decision in the St. Louis Post-Dispatch for September 8, 1920, except that the newspaper report omits the first two and unimportant paragraphs.

"The committeemen for the petitioners, the circulators and the signers of petitions were acting in a legislative capacity to accomplish that purpose. When the referendum petitions were taken, they were operative for that purpose alone. When the things taken became petitions they ceased to be pamphlets or blank referendum petitions dedicated to the use of accomplishing the repeal of a law.

"They were therefore written instruments because they represented an operative obligation. Under the common law written instruments were not the subjects of larceny. Under section 4927 of our statutes only such written instruments as affect pecuniary obligations or such written instruments as affect title to property are personal property and, as such property, the subject of larceny. Referendum petitions operative only for a public purpose of a legislative nature are not within this statute. Anything to be property must be something of some appreciable pecuniary value.

"Property is something that is the subject of ownership about which the owner can do practically as he pleases—burn it or otherwise destroy it if he wants to.

"It is something that the owner can sell or trade. Generally it is something that the owner can devise, or that goes to his heirs at his death. Referendum petitions lack all of these attributes of personal property. The idea of ownership of referendum petitions would be inconsistent with their legislative purpose. They are therefore public documents because devoted solely to a public purpose and are not the subject of larceny. For the above reasons the demurrer is sustained."

HISTORICAL BACKGROUND

This statement appears in the opinion, *supra*: "Under the common law written instruments were not the subjects of larceny." No doubt the court's conviction was the result of the brief furnished by defendant's counsel. At least that point of view was urged again and again in the brief for defendant.[8]

8. Brief for defendant, p. 72, concludes as follows: "When the state

It is believed that the authorities in England relating to the subject matter of larceny justify no statement that includes within the term "written instruments" more than (1) written instruments concerning lands in such a manner as to be said to "savour" thereof and (2) choses in action.[9]

A review of the authorities in England becomes necessary. The following may not be complete but every English decision with any real bearing on the question that has come to the attention of the writer is included.

Coke published his Institutes[10] in 1628 and uttered the following: "It is said (?) though they be personal goods, yet if they savour anything of the realty, no larceny can be committed of them." Among the illustrations of his doctrine he gave, unfortunately, this example: "So it is of a box or chest with Charters, no larceny can be committed of them, because the Charters concern the realty, and the box or chest though it be of great value, yet shall it be of the same nature the Charters be: of and *omne majus dignum trahit ad fe minus.*"[11]

He seems not to have dealt with the question of choses in

says it is a charge for stealing paper only, the answer comes, that the state in describing the things stolen, has described written instruments and documents, which have absorbed the paper, and in their higher character, as such written instruments, are not the subject of larceny at common law or under the statutes. The paper cannot be separated from the writing and the state is foreclosed."

9. It might be pointed out that most instruments "savouring" of land are also choses in action.

10. Coke's Third & Fourth Institute p. 109. Mr. Justice Stephen in his excellent "History of the Criminal Law of England" gives a summary of the treatment of larceny by the earlier writers—Glanville, Bracton, Britton, Mirror—and it seems safe to say that the problems here considered had not then arisen. Vol. III, pp. 129-136.

11. "During the reign of Edward IV. many points connected with the law of larceny were raised and discussed.

"One of the most curious occurred in 1471. It is referred to by Coke as 10 Edw. 4, 14, but is described in the Year-book as 49 Hen. 6, p. 14, No. 9.

"William Wody was indicted for stealing six boxes with charters and muniments relating to real property. After much debate this was held, before all the justices in the Exchequer Chamber, not to be felony. The reasons seem to have been, partly because the deeds were not chattels but were of the nature of real property, and partly because they had no definite assignable value. As to the boxes, it was argued, and the court

action until he delivered the opinion in *Calye*'s case.[12] There, by the sheerest *dictum* it was stated that felony could not be committed of "charters, evidences, obligations, deeds, specialties, etc." Aside from the inference that might be drawn from the doctrine as to charters concerning realty this seems to have been the first appearance in English law of the doctrine that a chose in action was not the subject of larceny.[13]

In 1678 Hale published his Pleas of the Crown.[14] He stated the law as follows: "Therefore of chattels real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or chest of charters, that concern land." In a note it is added:[15] "Nor can felony be committed of bonds, notes, or other writings that are securities for a debt, because they

seems to have adopted the argument, that the boxes were of the same nature as the deeds contained in them. This appears to me to be one of the most pedantic and unmeaning decisions in the whole law." Stephen, History of the Criminal Law of England, Vol. III, pp. 138-139.

12. (1584) 8 Coke 63.

13. "The Year-books do not refer to *choses* in action other than deeds. There is no decision that a bond, for instance, which did not affect land was incapable of being stolen. Coke, however, who accepted any sort of principle laid down in the Year-books as if it was a law of nature, accepted this principle and applied it to all *choses* in action whatever. In Calye's case he gives an elaborate commentary on the writ in the Register which defines the liability of innkeepers for the goods of their guests. Some of its words, he says, 'extend to all moveable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties etc.' The only authorities quoted for this incidental statement are the case in the Year-book 10 Edw. 4, 14, which has been already noticed, and which says nothing of any documents except title-deeds to land; FitzHerbert, *Indictments,* 19; and Broke, *Corone,* 155 (it should be 154); both of which are mere abridgments of the case in the Year-books. Hence the doctrine that a *chose* in action cannot be stolen, which has for its consequence the absurd conclusion that a bank note cannot be stolen, rests upon no foundation except a wholly unauthorized extension made by Coke, in treating of a different subject, of a case in the Year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to lands. In the present day it would be too late to dispute this doctrine, as it has been implicitly recognized by a great deal of legislation founded upon it." Stephen, History of the Criminal Law of England, Vol. III. p. 144.

14. "Coke and Hale repeat the earlier authorities but add little to them." Stephen, History of the Criminal Law of England, Vol. III, p. 141.

15. Hale's Pleas of the Crown, Vol. I, p. 510.

derive their value from *choses en action,* which cannot be stolen." [16]

In 1716 Hawkins published his Treatise of the Pleas of the Crown[17] and addressing himself as to "what are such goods, the stealing whereof may amount to felony" he stated (1) "They ought to be no way *annexed to the freehold;*" and (2) "they ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose in action.*"[18]

Blackstone, in his commentaries, published in 1765, extends the doctrines no further. "..... Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass; because they concern the land, or (according to our technical language) *savor* of the *realty,* and are considered as part of it by the law, so that they descend to the heir, together with the land which they concern.

"Bonds, bills, and notes, which concern mere *choses in action* were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value, and not

16. "It is obvious that it is physically impossible to misappropriate a right of action against the world at large, such as the copyright of a book or a patent to an invention, though it is possible to infringe and so to diminish or destroy its value. It is equally obvious that it is physically impossible to misappropriate a right of action against a particular person. No one can steal a debt, or a share in a partnership, or stock in the funds, but this ought to be coupled with the observation that there is no difficulty in misappropriating things which are valuable only as the symbols of debts or other liabilities, such as promissory notes, bonds, bank-notes, share and stock certificates." Stephen, History of Criminal Law in England, Vol. III, pp. 125-126.

17. Book I, ch. 33, Secs. 34, 35.

18. Hawkins states the reason for this doctrine to be that "they being of no manner of use to any one but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and everybody's money." Such may have been good social policy at one day but unfortunately as social and economic conditions changed, the rule did not except by statutes.

importing any property in *possession* of the person from whom they are taken."[19]

In East's Crown Law[20] the doctrines of the earlier common law were summarized as follows:

> "As larceny cannot be committed of things real at common law, neither can it be committed of charters or other written assurances concerning the realty, because they savour of the same nature; or as some writers say, because they are not in themselves of any value; though Lord Coke and Staundford give the same rule as to the box or chest in which they are kept, to which the latter reason would not apply." [21]
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> "In order to make the stealing of goods felony, they ought to have some worth in themselves, and not merely from their relation to some other thing: and therefore bonds, bills, notes, and other securities, which concern mere choses in action, were not the subjects of larceny at common law, being of no intrinsic value, and not importing any property in possession of the person from whom they are taken." [22]

So far nothing appears to indicate that there was any belief among the earlier writers of conceded authority that larceny was impossible of a written instrument as such.

Next must be considered the development of the law through the modern cases. First will be considered cases involving instruments concerning real estate and then instruments which at least resemble choses in action and finally what may be designated as public documents or instruments.

19. 4 Blackstone's Commentaries, Lewis' Ed., p. 234.
20. Vol. II, Ch. XVI, Secs. 34, 36.
21. East's Crown Law, Vol. II, p. 596.
22. East's Crown Law, Vol. II, p. 597.

INSTRUMENTS SAVOURING OF REALTY

In *Rex v. Westbeer*[23] the prisoner was indicted for theft of a parchment writing, purporting to be a commission impowering the commissioners therein named to enter and ascertain the boundaries of certain manors and "to certify how high the water of *Furnace Pool* ought to be kept" and also a parchment writing, purporting to be a return made to the commission. The jury returned a special verdict that the defendant was guilty of taking away "a parchment writing, value *one penny,* from the records in the Court of Chancery" and "another parchment writing annexed thereto, value *one penny.*" It was objected on behalf of prisoner (1) that being records the indictment ought to have been on 8 Hen. VI. c. 12 S. 3[24] and (2) "that they concerned the realty and could not become the subject of larceny, from their constructive adherence to, and connection with the freehold." The court considered only the second point and "were unanimously of opinion that these parchment writings concerned *the realty,* and that therefore the prisoner was not guilty of the felony charged in the indictment." [25]

William Powell was charged with burglariously breaking and entering the dwelling-house of David Williams with intent to steal "goods and chattels" therein. The prisoner had borrowed two sums of money of Williams and had executed two mortgages in fee of freehold land to Williams. The sums loaned were un-

23. (1739) 1 Leach's C. C. 12.

24. "III And moreover it is ordained, That if any Record, or Parcel of the same Writ, Return, Panel, Process, or Warrant of Attorney in the King's Courts of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided by any Clerk or by other Person, because whereof any Judgment shall be reversed, that such Stealer, Taker away, Withdrawer, or Avoider, their Procurators, Counsellors and Abettors thereof indicted, and by Process thereupon made thereof duly convict by their own Confession, or by Inquest to be taken by lawful Men, whereof the one half shall be of the Men of any Court of the same Courts, and the other half of other, shall be judged for Felons, and shall incur the Pain of Felony. (2) And that the Judges of the said Courts of the one Bench or of the other, have Power to hear and determine such Defaults before them, and thereof to make due Punishment as afore is said."

25. *Rex v. Westbeer* (1739) 1 Leach's C. C. 12 l. c. 14.

paid and Powell entered with intent to steal the mortgage deeds. The conviction was quashed,[26] the court saying:

> "This finding makes it unnecessary to consider whether the securities savour of the realty or are evidence of the title to real estate so as not to be the subject of larceny, because, being subsisting securities for the payment of money, they are clearly *choses in action,* and, as such, are not properly described in the indictment as goods and chattels." [27]

CHOSES IN ACTION

In *Rex v. Clark*[28] the prisoner was charged with the theft of a large number of promissory notes issued by the firm of Messrs. Large and Son and made payable at Brown, Cobb & Co., in London. The notes in question had been paid and when stolen were in a parcel directed to Messrs. Large & Son. The latter firm was permitted by act of parliament to reissue the notes for three years. In consequence of the loss they would be compelled to issue other notes with other stamps. The indictment charged the stealing of (a) promissory notes and (b) "pieces of paper" stamped with a stamp "of a certain value." At a meeting of "all the judges" the conviction under (b) was held proper since "the paper and stamps, particularly the latter, were valuable to the owners." [29]

26. *Regina v. Powell* (1852) 2 Denison's C. C. 403.

27. *Regina v. Powell* (1852) 2 Denison's C. C. 403, 1. c. 410.

See *Regina v. Williams* (1852) 6 Cox's C. C. 49, where a mortgage deed and title deeds accompanying it were held subject matter for larceny within 7 & 8 Geo. 4., C. 29, S. 5., making it a felony to steal "any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money."

28. (1810) Russel & Ryan 181.

29. *Rex v. Clark* (1810) Russel & Ryan 181 l. c. 183. See II Russel on Crimes, 9th Ed., p. 269, note: "If a chattel be valuable to the possessor, though not saleable, and of no value to anyone besides, it may still be the subject of larceny."

Compare this statement in the opinion of Judge Patterson, *supra*: "Anything to be property must be something of some appreciable pecuniary value." That view seems indefensible as a matter of principle. If one has possession of an object that is valuable to him alone and valu-

In *Rex v. Vyse*[30] the prisoner was tried for receiving with guilty knowledge certain stolen property described in the indictment as (1) thirty pieces of paper and (2) thirty valuable securities.[31] Whitehead and Co., bankers, had issued 1£ promissory notes. As these were paid by Glyn & Co. in London they

able for any reason peculiar to him there is need of protecting him in that possession. Otherwise, society ceases to function in a matter of social importance and the individual is tacitly invited to use his physical strength even tho it endangers the public order. There is neither time nor space to fully examine this phase of the law of larceny but the following decisions are believed to be representative of the English law.

Regina v. Godfrey (1838) 8 Car. & P. 563: Indictment for theft of (1) six sheets of paper and (2) a paper parcel containing two letters. Alexander, for prosecution, stated in opening statement that prisoner opened package and letters, read them, and "then disposed of them in such manner as he thought proper." Lord Abinger, C. B., directed an acquittal evidently thinking that the trespass must be done with intent to gain some advantage. But *quaere.* Decision may be justified. No showing that prisoner converted the letters. In *Regina v. Jones* (1846) 1 Denison's C. C. l. c. 196, Bros for the crown, stated: "*R. v. Godfrey,* 8 C. & P. 563, seems not to be law."

Regina v. Jones (1846) 1 Denison's C. C. 192, 2 C. & K. 236. Prisoner took letter addressed to another person and burned it in order to prevent the possibility of an unfavorable recommendation from the person to whom the letter was addressed. Held, larceny. Sufficient advantages to prisoner without admitting any necessity for *lucri causa.* In argument, Bros for the Crown stated: "The definitions of larceny in the Mirror, Bracton, Coke's Institutes, Lord Hale, Mr. Sergeant Hawkins, and Lombard,—none of them contain the words '*lucri causa*;' and Mr. Justice Blackstone is the first who introduces them, and the definition of larceny given by Mr. Serjeant Russel is taken from Justinian."

Regina v. Privett and Goodhall (1846) 1 Denison's C. C. 197. Prisoners were servants of prosecutor and apparently took their master's oats and secreted them in a loft for purpose of giving to their master's horses and without intent of applying to their own benefit. Held, larceny even tho no *lucri causa.* Two of eleven judges dissented because no intent to deprive owner of property in goods.

Regina v. Wynn (1848) 1 Denison's C. C. 365, 2 C. & K. 859. Prisoner, employee in postoffice, made mistake with reference to sorting two letters containing money and to avoid a supposed penalty attaching to his mistake secreted the letters in a water closet with intent to destroy them. Held, larceny.

In applying the above to the opinion rendered by Judge Patterson it is to be remembered that the indictment alleged that the paper pamphlets were of the value of twenty-two dollars and eighty-seven cents and there is no statement that the plaintiff failed to give evidence to prove this allegation.

30. (1829) 1 Moody's C. C. 218.

31. The first count charged: "That he, - - - - , thirty pieces of paper of great value, towit, of 30£ each, the said pieces of paper being

were wrapped up in bundles and labeled. About forty of these bundles in a bag were stolen from one of the partners of Whitehead and Co. It appears to have been possible for Whitehead and Co. to reissue such paid notes. Ten judges held the conviction right, some of them "doubted whether the notes could properly be called valuable securities; but, if not, they all thought they were goods and chattels." [32] It seems that the correct point of view as to this case was uttered by Maule, J., in *Regina v. Watts*: "The notes were nothing but paper until re-issued, because they derived their whole operation from being delivered to some one." [33]

At *nisi prius* was determined *Rex v. Mead.*[34] The defendant was indicted for embezzling (a) "pieces of paper of the value of one penny and (b) 'pieces of paper partly written and partly printed,' bearing stamps, the values of which were specified." The proof was that the articles stolen were "halves of country bank notes." The sentence of the prisoner was justified on the ground that the halves might have been of value to prosecutor "by his putting the two halves together." [35]

John Atkinson on his way home was rushed upon, knocked down and beaten till he was disabled. The prisoners then rifled

stamped with a stamp, value 5d., the same being the stamp directed and required by the statute in such case made and provided, on every promissory note for payment to the bearer on demand for every sum of money not exceeding 1£ 1s., of the goods and chattels of John Whitehead and others, lately before stolen, etc., - - - feloniously did receive - - - said pieces of paper so stamped, and each and every of said stamps being then available and of full force and effect, against the statute, etc." The third count was for "feloniously receiving on the same day at the same parish, thirty valuable securities commonly called promissory notes, each of the said valuable securities being for payment to the bearer on demand of the sum of 1£ and the value of 1£ of the property of John Whitehead and others" etc. *Rex v. Vyse* (1829) 1 Moody's C. C. 218.

32. *Rex v. Vyse* (1829) 1 Moody's C. C. 218 l. c. 223.
33. (1854) 6 Cox's C. C. 304 l. c. 306.
34. (1831) 4 Car. & P. 535.
35. Counsel for prisoner argued that "these halves of country bank notes were not goods and chattels. If the notes had been entire, they would have been *choses in action*, not goods and chattels; but, in their present state, they were of no value."

his pockets and when Atkinson "came to himself" he missed a "slip of paper" "which contained a memorandum of a sum of money which a person owed him." The prisoners were indicted for robbing John Atkinson of 'one piece of writing paper of the value of one penny, one other piece of paper, of the value of one penny, and one written memorandum, of the value of one penny, of the goods and chattels of the said John Atkinson.' They were found guilty at *nisi prius,* Gurney, B., declaring: "If anything was taken away from the prosecutor by violence, however insignificant its value, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, showed that he considered that *it was of some value to himself."*[36] (Italics supplied.)

In *Regina v. Murtagh*[37] the prisoner was indicted for theft of "one half of a certain promissory note for the payment of money, to wit, for the payment of the sum of twenty pounds, which said one half of the said promissory note was numbered 4432, of the goods and chattels of one James Savage." During the argument before submitting the case to the jury the statement was made that the article was one half of a Bank of Ireland note and it was urged that the indictment was defective in failing to allege that the article had a value. In arresting the judgment following a verdict of guilty, however, Doherty, C. J., placed his decision on the basis that the article was "a mere *chose in action,* and of no intrinsic value." [38]

It is possible to reconcile this case with *Rex v. Mead, supra,* if it be assumed that in the preceding case a half of a bank note

36. *Rex v. Bingley and Law* (1833) 5 Car. & P. 602. No consideration was apparently given to the possibility that the memorandum was a chose in action, or more properly, evidence of a chose in action. Perhaps this was the result of a tendency by the English courts to limit the unfortunate *dictum* of Lord Coke.

37. (1840) 1 Crawf. & Dix 355.

38. See *Rex v. Johnson* (1815) 3 M. & S. 539 l. c. 550: "The subject of this indictment is bank notes which were not the subject of larceny at the common law, because they fell under the denomination of choses in action." (*dictum*)

could not be redeemed and that it ceased to be a valuable security by reason of being only a half.

In *Regina v. Perry*[39] the indictment was in several counts, two of which were for stealing (1) an order for the payment of money and (2) 'one piece of paper of the value of one penny.' The Great Western Railway Company in order to pay a debt drew a check at Paddington upon their London bankers and sent it to the superintendent at the Taunton station. The latter handed it to the chief clerk with orders to pay it to the overseer. The chief clerk converted the same and later cashed it with a tradesman in Taunton and applied the proceeds to his own use. Counsel for defendant (chief clerk) raised the point that the cheque was void for failure to have a stamp affixed thereon. Thirteen judges held the conviction right "as, at all events, there was a stealing of a piece of paper, which was sufficient to sustain a count for larceny." [40]

During the argument of the case the following occurred:[41]

"Cresswell, J.—If a blank cheque were stolen, would that be larceny?

"Rowe.[42]—I think it would.

"Cresswell, J.—Then is it less the subject of larceny for being filled up?

"Rowe.—That is the doctrine laid down in Hawkins, as I understand it."

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"Alderson, B.—Suppose an autograph of great value written on a sheet of paper, would that prevent it from being the subject of larceny?" [43]

39. (1845) 1 Car. & K. 725, 1 Cox C. C. 222.

40. *Regina v. Perry* (1845) 1 Car. & K. 725 l. c. 729.

41. *Regina v. Perry* (1845) 1 Cox's C. C. 222 l. c. 224. Compare: *Regina v. Walter Watts* (1850) 2 Denison's C. C. 14. (a cancelled cheque fraudulently destroyed by a clerk. Held guilty of stealing a "piece of paper." That such was subject-matter of larceny not controverted. Discussion concerned distinction between larceny and embezzlement.)

42. Counsel for defendant.

43. The report of the case in 1 Car. & K. 728 has the following: "W. C. Rowe.—It apeared to me that the effect of converting the paper into a cheque was to make it valuable, if at all, as a security for money,

In *Regina v. Boulton,*[44] a prosecution for false pretenses, it was held that an ordinary coupon railway ticket was a chattel within the meaning of the statute punishing false pretenses. Aside from the criticism of the decision for reasons not important here[45] it has been suggested that the court overlooked the fact that the ticket was only evidence of a contract by the railway to carry the holder.[46]

In the well considered case of *Regina v. Watts*[47] it was held that larceny could not be committed where the subject matter was a written agreement signed by prosecutor and prisoner, whereby the latter had agreed to build two cottages for prosecutor. At the time of the alleged theft work was going on under the agreement and although prisoner had been paid all that was owing to him still it was an executory agreement.[48] The prisoner had been convicted of stealing a *piece of paper* and the prosecution

and that, the moment the paper had a cheque written upon it, it became a chose in action, which is not the subject of larceny. Alderson, B.—The nature of the paper is not so wholly absorbed in the chose in action as you put it."

44. (1849) 1 Denison 508.

45. *Regina v. Kilham* (1870) 11 Cox's C. C. 561.

46. Stephen, Digest of the Criminal Law, p. 250, note 2. Compare: *Regina v. Rodway* (1841) 9 Car. & P. 784: Prisoner owed his landlord rent. Latter prepared, signed and stamped a receipt and demanded payment. Prisoner permitted an examination of receipt. Then he paid only part of amount due and went away. Apparently assumed that receipt was subject to larceny. Coleridge, J. thought prisoner guilty but jury returned verdict of not guilty.

Regina v. Frampton (1846) 2 C. & K. 47. Facts same in effect as in *Regina v. Rodway,* except the stamped paper was produced by prosecutor, handed to prisoner who wrote out the receipt. Then it was signed by all concerned, prisoner keeping one finger on it all the time. Prisoner walked away with receipt without making payment. Wightman, J., directed an acquittal distinguishing *Regina v. Rodway* because prosecutor never had possession of receipt "in a complete state." *Quaere* as to distinction.

Regina v. Smith (1852) 2 Denison's C. C. 449. Charged with larceny of receipt duly stamped of payment of money. Conviction quashed because receipt not in possession of prosecutor. Apparently assumed by all that receipt was subject-matter for larceny.

47. (1854) 6 Cox's C. C. 304.

48. "Martin, B.—And an action might be maintained upon it for not building according to the specification." l. c. 306.

"As to this not being a chose in action, because all that was due had been paid upon it. it appears that the agreement is still executory,

attempted to avoid the rule that evidence of a *chose in action* could not be the subject of larceny by urging (1) that all due under the agreement had been paid and (2) that the want of a stamp prevented it from being a *chose in action.* The conviction was reversed, however, by the concurrence of ten judges. Parke, B., dissented because the paper remained paper until the instrument had been perfected by affixing a stamp.[49] There seemed to be no disagreement that the actual written agreement could have been stamped at any time before offered in evidence. In the particular case the written agreement could not be produced and secondary evidence was offered. Platt, B., effectively answered Parke, B., by saying: "It would surely be strange to hold that it was no agreement until it was stamped, when the necessity for a stamp arises from its being an agreement." [50] All except Parke, B., seem to have thought that the paper in question was the evidence of a chose in action and therefore within the general rule.[51]

The indictment in *Regina v. Morrison*[52] was in four counts: (1) larceny of a warrant for delivery of a watch; (2) of a pawnbroker's ticket; (3) of a piece of paper; and (4) for receiving all knowing them to have been stolen. The prisoner was con-

and might be used by either side to prove their rights." Lord Campbell, C. J. 1. c. 307.

This point, i. e. the agreement still executory, seems to have been ignored in the discussion of the case in the brief for defendant, p. 21.

49. Lord Campbell ruled at the outset of the argument that the stamp laws applied to criminal cases. 1. c. 305.

50. (1854) 6 Cox's C. C. 304 1. c. 309.

51. II Russell on Crimes, 9th Ed., makes the following comment on the decision: "The matter of the agreement was of the value of twenty pounds or upwards, and therefore by law required a stamp, but as between the parties to it, it would be available as an agreement without a stamp, but no evidence was given on either point." Compare: *Rex v. Yates* (1827) 1 Moody's C. C. 170. Charge of obtaining "an order for the payment of the sum of 2£," by false pretenses. Proof that prosecutor sent "a check drawn upon Messrs. Child & Co. payable to D. Francis Jones for 2£." Held that "order was not a valuable security within 7 & 8 G. 4, as it ought to have been stamped and therefore the banker would have subjected himself to a penalty of 50£ by paying it." Observe that there was no count for obtaining a piece of paper.

52. (1859) Bell's C. C. 158.

victed on the fourth count and the question arose whether the pawnbroker's ticket was the subject of larceny. The Court for Crown Cases Reserved, in affirming the conviction, held that "the pawnbroker's ticket may well be held to be a 'warrant for the delivery of goods' within the meaning of 7 & 8 Geo. 4, c. 29 S. 5." [53] The court was willing, however, to suppose that it was wrong in the interpretation of the statute and advanced the opinion "that the conviction was right as for stealing a pawnbroker's ticket or piece of paper." [54] The argument advanced by Crompton, J., was that the common law rule extended only to (1) documents of title to real property and (2) choses in action. His notion of a chose in action did not include an agreement which represented a specific personal chattel "to the property and right of possession of which the party has a right to treat himself as entitled - - - -." [55] The conclusion was, therefore, that aside from statute a pawnbroker's ticket was the subject of larceny as such or as a piece of paper. Furthermore, the court in effect rejected the view that a piece of paper ceases to be the subject of larceny merely because there appears upon it a completed instrument or document. It is also interesting to observe that the statute though couched in broad terms was

53. "V. And be it enacted, That if any Person shall steal any Tally, Order or other Security whatsoever, entitling or evidencing the Title of any Person or Body Corporate to any Share or Interest in any Public Stock or Fund, whether of this Kingdom, or of *Great Britain* or of *Ireland,* or of any foreign State, or in any Fund of any Body Corporate, Company, or Society, or to any Deposit in any Savings Bank, or shall steal any Debenture, Deed, Bond, Bill, Note, Warrant, Order, or other Security whatsoever for Money or for Payment of Money, whether of this Kingdom, or of any Foreign State, or shall steal any Warrant or Order for the Delivery or Transfer of any Goods or valuable Thing, every such Offender shall be deemed guilty of Felony, of the same Nature, and in the same Degree, and punishable in the same Manner as if he had stolen any Chattel of like Value with the Share, Interest, or Deposit to which the Security so stolen may relate, or with the Money due on the Security so stolen or secured thereby and remaining unsatisfied, or with the Value of the Goods or other valuable Thing mentioned in the Warrant or Order; and each of the several Documents hereinbefore enumerated shall throughout this Act be deemed for every purpose to be included under and denoted by the Words 'valuable Security'."

54. *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 164.

55. *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 165.

not construed as conclusive of the whole field of larceny but as supplemental to established common law conceptions. Anything that may be stolen before the statute remains so unless clearly eliminated. At least such seems to have been the point of view of the English court.[56]

It seems reasonably certain from the above decisions that the English courts have never considered the absurd and indefensible rule relating to choses in action as applying to all written instruments. Indeed, *Regina v. Morrison, supra,* refuses to apply the rule to an instrument that was evidence of an obligation between parties. Is it not curious that an English court in the middle of the nineteenth century is found to be restricting its doctrine while an American court in the twentieth century is attempting to extend a transplanted and anarchronistic notion that rests on a fiction which is socially inexpedient?

PUBLIC DOCUMENTS

Another point of attack by defendant in the case under review was that the referendum petitions were "public instruments and not the subject of private or personal ownership" and that "they were public documents, all the functions and uses of which were public and had no private or personal functions or uses." [57] At the same time defendant was careful to avoid the assertion that the petitions were public records because of the danger of Section 4543 R. S. Mo. 1909. It was argued that it was not necessary to file the petitions but that they became complete as soon as they were signed.[58] The next step is not alto-

56. "We think, therefore, that we should be extending the rule further than we are warranted by any authority in doing, if we were to hold that it extended further than to cases where the document concerns *choses in action* merely, and is only an agreement to deliver personal property, not the party's own; - - - - - - " *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 166.

57. Brief for defendant, p. 9.

58. Brief for defendant, p. 73:

"The State, while conceding referendum petitions were taken, says the petitions are not completed instruments until filed and are not public documents until filed. This contention, of course, is untenable in law or reason. If, to make them completed instruments or public documents, it were necessary to file the same, still, the charge as laid in the indictment

gether clear but apparently it was expected that if a written instrument was also a public instrument or document it was (so to speak) a written instrument raised to the nth degree and, therefore, more certainly a thing unprotected by criminal law.

An opinion is ventured that the position is unsound on principle. How is it possible for a written instrument to be a "public document" which has never been filed in a public office nor come into the possession of a public officer? Suppose the indictment had alleged that the petitions had been filed with and were property of the Board of Election Commissioners.[59] Would the charge have been sustained by testimony that they were completely signed and in the possession of one Edward H. Heilman who expected to file them the next day? If the answer be in the negative then it is obvious that the allegation made was the only one the facts were capable of. Neither Heilman nor "the committee of the petitioners" was under any *legal* duty to file the petitions the next morning. In short, the petitions were no

carries the filing with it; having charged the taking of referendum petitions, this, as stated before, would carry with it every essential element to make the same completed referendum petitions, instruments or public documents. There is no negative charge that any essential element or act is wanting to make them either completed instruments or public documents.

"Referendum petitions, however, are completed the moment they are signed by the voters, and that act makes them public documents and nothing further is necessary. The mere filing adds nothing to the completeness of the instrument, and being complete, it is necessarily a public document, because the Constitution and the Charter of the City of St. Louis make it such, and, furthermore, all its uses and functions are public."

59. "Sec. 4. Signatures, uniform papers, committee of petitioners, affidavits, filing, names and addresses.—The signatures need not all be appended to one paper, but all papers comprising any original or supplemental petition under this article shall be uniform in character and shall each set forth the ordinance in full and contain the request mentioned in section 2, and designate by names and addresses five persons as the committee of the petitioners, and each such paper shall be verified by an affidavit stating the number of signatures thereto and that each signature was made in affiant's presence by, as affiant verily believes, the person whose name it purports to be; and all papers comprising an original or supplemental petition shall be assembled by the petitioners and filed with the board of election commissioners as one instrument. Each signer shall state opposite his signature his residence address. Any person shall be deemed a registered voter within the meaning of this article whose name is unerased on the registration books." Charter of the City of St. Louis, Art. VII., Sec. 4, Rev. Code, St. Louis, 1914.

more public documents until filed than a deed is a deed before delivery or a promissory note is such until the last legally necessary act is done.[60]

What does it matter if the petitions were public documents or instruments? The English courts, at least, seem never to have thought that a public document was not subject matter of larceny. The only question that would seem to arise concerns the question in whom the property[61] will be laid.

Francis Walker stole "in the Inner Temple, one roll of parchment, being records of the Court of Common Pleas at Westminister, and containing remembrances and rolls of the said court, and dockets of causes entered of record in the said court." Various counts were used to allege the property to be in various persons from "our lord the King" to "Thomas Sherwin." The prisoner was found guilty at Old Bailey but the "learned Recorder entertained very strong doubts, whether an actual existing record of the courts at Westminister could properly be described as mere parchment, so as to change its actual use and nature, and reduce it to mere personal chattels" and played for the opinion of the judges. In due time the judges met and held "that as the records did not concern the realty, as was the case in *Rex v. Westbeer,* stealing the parchment was larceny." [62]

Counsel for defendant in the case under review attempted to avoid the force of this decision by stating in their brief[63] that the prosecution was under the statute of 7 & 8 Geo. 4., c. 29, sec. 21. The only apparent authority for that statement is the fact that the reporter by way of annotation copied the section

60. *Rex v. Phipoe* (1795) 2 Leach's C. C. 673 (compelling one by duress of threats to life to sign a promissory note in perfect form does not constitute property which may be subject matter of robbery; paper and ink the property of prisoner and perhaps within her possession at all times). See also *Rex v. Hart* (1833) 6 Car. & P. 106.

61. Larceny is, of course, a violation of a person's possession and not his property but unfortunately the standard form of indictment uses the term "property." See a scholarly dissertation in an excellent but largely unknown treatise: Pollock and Wright, "Possession in The Common Law."

62. *Rex v. Walker* (1827) 1 Moody's C. C. 155.

63. Brief for defendant, p. 37-38.

in the margin. Nowhere in the opinion is reference made to the statute. Furthermore, the statute was not enacted until June 21, 1827, and it was therein provided: "That this Act shall commence on the first day of July in the present year." The opinion[64] at the outset states that the prisoner was tried "in the year 1826, for grand larceny." The decision of the Court for Crown Cases Reserved was delivered in "Hilary[65] Term, 1827." Therefore, the final opinion was delivered several months before the passage of the statute. Moreover, it would seem safe to assume that grand larceny was a felony in England at that day. The statute denounced acts which were made misdemeanors.[66]

The Colonial Minister received two dispatches from the Lord High Commissioner of the Islands and had copies printed for private distribution. Twenty-eight copies were delivered to the sub-librarian at the Colonial office. The prisoner took a copy and was indicted for "stealing ten pieces of paper, value one penny, the property of our Sovereign Lady the Queen." Martin, B., instructed the jury that the only question it had to solve was whether defendant *"intended to deprive that office of all property in them and to convert them to his own use."* The verdict was one of not guilty. It was observed by Martin, B., as follows:

> "Such documents as these are clearly the subject of larceny, and inasmuch as the stealing of the paper itself would have been a felony the fact of the paper being printed on makes no difference, and indeed this fact might in a great many instances materially increase the value." [67]

(To be continued)

64. *Rex v. Walker* (1827) 1 Moody's C. C. 155.

65. "A term of court, beginning on the 11th and ending on the 31st of January in each year." Black's Law Dictionary, p. 572.

66. It is stated in the brief for defendant, p. 38, with reference to this decision that "it is clear that the judges decided nothing except that he was guilty under the statute and by virtue of its terms." It is submitted that the error in this statement has been demonstrated.

67. *Regina v. Guernsey* (1858) 1 F. & F. 394.